IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

JUDGMENT

M/s. Nisha Industries **Vs.** M/s. Sanjay Enterprises & Ors.

D.B. Civil Special Appeal No. 64/1998
in
S.B. Civil Misc. Appeal No. 321/1991

Date of order :: July 18, 2007

PRESENT
HON'BLE MR.JUSTICE R.C. GANDHI.
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Alok Sharma for the appellant

(ORAL, PER HON'BLE MR. GANDHI, J)

1. This appeal has been filed under Section 18 of the Rajasthan High Court Ordinance, 1949, against the judgment dated 21.07.1997 passed by the learned Single Judge in S.B. Civil Misc. Appeal No. 321/1991, whereby the First appeal has been dismissed upholding the order dated 07.02.1991 passed by the Additional District Judge No. 2, Jaipur City, Jaipur.

2. The plaintiff appellant instituted a suit for recovery of Rs. 2,63,860.53 alongwith interest against the defendants

respondents. The defendants-respondents filed written statement and pleaded that the court at Jaipur has no jurisdiction to try and decide the suit as the contract was concluded at Bombay, it was signed at Bombay and payment was made at Bombay. The learned trial court on the question of jurisdiction returned the findings that the court at Jaipur had no jurisdiction to try the suit and returned the plaint to the appellant for presentation before a competent court.

3. Against the order of the trial court, appeal was preferred before the learned Single Judge on the ground that the trial court has not appreciated the letter Ex.1 received by post at Jaipur by the appellant, therefore, the part of the execution has arisen at Jaipur. It was stated by D.W. 1 Bharat Pareek that the plaintiff alongwith Mahesh Parekh came to their office at Bombay on the said date and the plaintiff accepted the agreement at Bombay. The learned Single Judge examined the letter dated 22.09.1982 and came to the conclusion that the agreement was drawn and executed at Bombay and rejected the appeal of the appellant.

4. This appeal has been preferred on the same grounds as set out in the memo of the first appeal challenging the order of the trial court and of the learned Single Judge that the erroneous findings have been recorded by the learned Single Judge for

dismissal of the appeal.

5. Heard learned counsel for the appellant. Learned counsel for the respondent is not present.

6. Learned counsel for the appellant has reiterated the submissions and emphasized that the letter Ex.1 has not been properly appreciated. The learned Single Judge deliberating on the said letter has recorded his finding, which reads as under:-

> "*This letter was produced and proved by the plaintiff before the trial court. In the examination in chief Madhu Sudan Kumar PW.1 stated that the letter Ex.1 was received by him by post at Jaipur. In the cross examination this witness stated that the plaintiff firm is in existence since 1972 but receipt register for entering the letters received by the firm was not maintained. DW.1 Bharat Pareek categorically stated that on Sept. 22,1982 the document Ex.1 was got drafted after agreement of the transaction. Plaintiff alongwith Mahesh Parekh came to his office at Bombay on the said date and the plaintiff accepted the agreement at Bombay. Ex.1 was never sent to Jaipur by post. In the cross examination this witness further stated that the said document was typed by the typist at Bombay.*"

7. Learned counsel for the appellant in support of his contention has relied upon the judgment of the learned Single Judge in the case title ***Balooram Vs. Firm Seth Uttamchand Bishandas*** reported in **RLW 1960 page 397** to convince us that the findings are not based on proper appreciation of evidence.

8. In this case it was pleaded that the plaintiff appointed the defendant firm as their commission agents for the purchase of jaggery in November-December, 1946 and in that connection, some money was paid to the defendant firm either in Pakistan or at Meerut. There were some transactions and last transaction took place at Bharatpur and thereafter a sum of Rs. 2825/- remained to be paid. The plaintiff filed a suit in the court at Bharatpur. Respondents took an objection that the contract was concluded at Sibi in Pakistan. The respondents denied the agreement set up by the plaintiffs and paying of the dues at Sibi and further pleaded that the cause of action did not arise either in part or whole within the territorial jurisdiction of the court. The trial judge held that no part of cause of action arose in Sibi and the suit could not have been instituted in his court. He returned the plaint. The plaintiff filed an appeal in the court of District Judge, Bharatpur, which was dismissed on the same ground. The plaintiff filed revision petition wherein the plea was taken that rule of "a debtor should find the creditor", should be applied and therefore, the court at Bharatpur has jurisdiction. While dealing this point raised by the plaintiff therein, the court relied upon the Privy Council judgment and observed in para 32 of the judgment as under :-

> *"32. Now, the principles which should be deduced from a review of the Privy Council*

case and various subsequent decisions and a consideration of the statutory provisions, may be stated as follows:-

(1) The technical rule that the creditor's residence at the commencement of the suit should determine the forum in the absence of a contract to the contrary should not be applied in India. India is a vast country and it is hardly fair to impose a burden upon the debtor to seek the creditor wherever he happens to go in this vast country. The Privy Council case (2) is consistent with this proposition. The contrary authorities in case (1.1) and (1.2) do not in my judgment state the correct law.

(2) If the place of performance of contract or for that matter, the place of payment of debt can be shown to be fixed expressly or impliedly and irrespective of or despite, the inferences arising from the obligation of the debtor to seek the creditor involved in the obligation to pay him, the applicability of the rule does not arise.

(3) Even though the place has not been fixed at the time of agreement expressly or impliedly, but if it has been subsequently fixed under sec. 49 of the Contract Act on an application of the promissor and with the consent of the promisee, the rule should not be applied.

(4) If it is not possible to establish an agreement respecting the place of performance or payment, express or implied, the court should apply the rule and should presume that the place of the creditor's residence at the time of the agreement was implied to be the place of performance or payment. The cases which have taken the view that the rule is only one of the factors that should be considered in determining the place of performance have not correctly interpreted

> *the Privy Council decision (2). Obviously, if on a consideration of the various circumstances, it is not possible to arrive at a finding as to an express or implied agreement regarding the place of performance or payment, I cannot see how other factors should be considered along with this rule for determining the place of performance, as the rule implies a clear presumption in the absence of a contract to the contrary.*

With the aforesaid observations, the revision petition was dismissed on the ground that the court at Bharatpur is not having the jurisdiction to try the suit.

9. Learned counsel for the appellant has submitted that the contract was concluded at Bombay, but the performance of it is not completely at Bombay, part of that is at Jaipur. His submission is that under the contract it was not obligatory for him to make payment of enhanced customs duty being beyond the terms and conditions of the contract, therefore, the suit would lie for recovery of the said amount, payment of which is made from Jaipur.

10. Once the contract is concluded, thereafter remains the performance part of it. If it is expressly determined in the contract that litigation, if any, between the parties will be at a certain place, it is essence of the contract and could be sued accordingly. In the contract, the place for suing has been shown

at Bombay. Whatever he has paid, which according to him is not obligatory being beyond the scope of the Agreement, whether he is required to pay or not, comes within the performance of the contract agreement and cannot be said to be outside the scope of the terms and conditions of the Agreement.

11. So far as the question of application of rule of "*a debtor should find the creditor*" is concerned, it can be made applicable only where there is not expressly stated in the contract with regard to the place of suing and execution of the contract, which is not a case herein. In this contract the place of execution and performance of the contract both has been shown at Bombay and the rule "*a debtor should find the creditor*" is not applicable.

12. Therefore, we hold that there is no substance in the plea of the learned counsel for the appellant. The order under appeal does not suffer from any illegality holding that the court at Jaipur has no jurisdiction. The appeal being devoid of merit is dismissed.

(Dr.VINEET KOTHARI),J. **(R.C. GANDHI),J.**

Pramod